STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: Martin M. Doctoroff, Kathleen Jansen, and Hilda R. Gage

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

vs **Supreme Court No. 119348**

LINDA PETIT,

Defendant-Appellant.

Court of Appeals No. 233294
Third Circuit Court No. 98-10041

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The People accept and adopt defendant's statement of jurisdiction. The Michigan Supreme Court has jurisdiction over this appeal by leave through MCR 7.301(A).

COUNTERSTATEMENT OF QUESTION PRESENTED

I.

This Court will not reverse a conviction based upon a claim of unpreserved error unless the defendant shows the error so prejudiced her that a miscarriage of justice resulted. Here, defendant presents no evidence that the trial court would have departed from the sentence agreement had defendant been given the chance to allocute before sentencing. Can this Court reverse defendant's conviction when defendant fails to show that she suffered any prejudice from the trial court's unpreserved error?

The People answer: "NO".
Defendant answers: "YES".
The trial court did not address this question.
The Michigan Court of Appeals did not address this question.

COUNTERSTATEMENT OF FACTS

The People accept and adopt defendant's statement of facts.

ARGUMENT

I.

This Court will not reverse a conviction based upon a claim of *unpreserved error unless the defendant shows the error worked* a miscarriage of justice. Here, defendant presents no argument or evidence that the trial court would have departed from the bargained-for sentence agreement had defendant been given the chance to allocute before sentencing. This Court will not reverse defendant's conviction when defendant fails to show that he suffered any prejudice from the trial court's unpreserved error.

The Michigan Supreme Court has granted defendant leave to appeal to consider the question: "[W]hether the failure to afford the defendant an opportunity to allocute at sentencing is harmless error in light of the fact that the sentence to be imposed was a part of the guilty plea agreement." The People submit that the more appropriate question to be asked, in light of defendant's failure to preserve this issue in the trial court and the provisions of MCL 769.26, is: Whether the failure to afford the defendant an opportunity to allocate at sentencing is reversible plain error in light of the fact that the sentence to be imposed was a part of the guilty plea agreement? The People answer this question: No.

The People concede that the trial court erred in failing to give the defendant an opportunity to speak at sentencing. By court rule, the trial court must give the defendant "an opportunity to advise the court of any circumstances [she believes] the court should consider in imposing sentence."[1] Here, defendant's trial counsel, Wright Blake, addressed the court and indicated there were no errors in the presentence report. Blake asked the court to comply with

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[1]MCR 6.425(D)(2)(c).

the sentence agreement reached between the People and defendant. (3/20, 4)[2] After hearing from the victim's family and the People, the trial court asked if there was "anything further." (3/20, 5) It is ambiguous whether the court's question was directed toward the defendant or her counsel. Blake responded to the question that there was nothing further. Defendant did not speak up to make any comment. Because it is ambiguous whether the court actually did give defendant an opportunity to speak, the People are in no position to dispute defendant's claim that the trial court did not comply with MCR 6.425.[3]

Having concluded that an error exists, the next inquiry is whether this was an error of constitutional magnitude.[4] The federal system requires its courts to specifically address the defendant and ask whether he or she wishes to say anything regarding sentence.[5] The United States Supreme Court addressed this requirement in *Green v. United States*. In *Green*, the Court recognized that allocution was a common-law right. In England as early as 1689, the failure to ask the defendant if he had anything to say before sentencing required reversal.[6] However, by

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[2]References to the trial record will be cited by the date of the hearing followed by the page number.

[3]In *Green v. United States*, 365 US 301, 81 S Ct 653, 5 L Ed 2d 670 (1961), the Court found no denial of allocution in a similarly ambiguous record. However, the court did instruct the lower courts that they should in the future, as a matter of good judicial administration, address the defendant specifically and unambiguously so no room for doubt exists.

[4]The determination that the error was of constitutional or nonconstitutional magnitude does not affect the standard of review. This Court reviews all unpreserved claims of error for plain error. *People v. Carines*, 460 Mich 750, 752 (1999).

[5]F.R.Crim.P. 32(a).

[6]*Green*, supra at 304.

1935, the ceremony of allocution was no longer performed in non-capital felonies in England.[7] The common-law circumstances necessitating the procedure no longer existed. Despite these changes in the law, the Supreme Court saw no reason why the right of allocution should be abandoned when there were still reasons to require the procedure.[8] The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.[9] Recognizing that the common-law right of allocution still endured, the Court indicated that the right was actually divided into two rights: the right to make a statement in his own behalf, and the right to present any information in mitigation of punishment.

One year later, the Supreme Court held that the common-law right of allocution was not a right of either constitutional or jurisdictional magnitude. In *Hill v. United States,*[10] the defendant made a collateral attack on his sentence because the sentencing court did not ask him whether he wished to make a statement on his own behalf before his sentence was imposed. The Court held that the " failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus."[11] Despite the acknowledged error by the sentencing court in not granting the defendant an opportunity to speak, the Court found the error was neither jurisdictional nor constitutional. The error was not a fundamental defect which inherently

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[7]Paul W. Barrett, *Allocution*, 9 Mo.L.Rev. 115, 124 (1944).

[8]*Green*, supra at 304.

[9]*Id.*

[10]*Hill v. United States*, 368 US 424, 82 S Ct 468, 7 L Ed 2d 417 (1962).

[11]*Hill*, supra at 428.

resulted in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure.[12]

The federal courts have been inconsistent in fashioning their tests for when a violation of the common-law right to allocution requires resentencing. Much of this inconsistency has resulted from the Supreme Court's relative silence since 1962 on the topic of allocution.[13] But the majority of the circuits have been consistent in applying some form of harmless error analysis. The Ninth Circuit has adopted a rule that the defendant is not entitled to resentencing unless he or she can identify specific statements on appeal that he or she would have made at sentencing that likely would have changed the trial court's determination of sentence.[14] The Eleventh Circuit has held that resentencing is appropriate only if failing to do so would result in "manifest injustice."[15] Several other circuits have concluded that resentencing is not required if the defendant has already received the lowest possible sentence.[16] The consistent thread in the

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[12]*Id.*

[13]The Court has addressed allocution only five times since 1962: *Machibroda v. United States*, 368 US 487, 82 S Ct 510, 7 L Ed 2d 473 (1962); *Andrews v. United States*, 373 US 334, 83 S Ct 1236, 10 L Ed 2d 383 (1963); *United States v. Behrens*, 375 US 162, 84 S Ct 295, 11 L Ed 2d 224 (1963); *McGautha v. California*, 402 US 183, 91 S Ct 1454, 28 L Ed 2d 711 (1971); *Groppi v. Leslie*, 404 US 496, 92 S Ct 582, 30 L Ed 2d 632 (1972). Only in *McGautha* did the Court give allocution more than a passing mention.

[14]*United States v. Leasure*, 122 F 3d 837, 841 (CA 9, 1997).

[15]*United States v. Rodriguez-Velasquez*, 132 F 3d 698, 700 (CA 11, 1998).

[16]*United States v. Riascos-Suarez*, 73 F 3d 616, 627 (CA 6, 1996); *United States v. Lewis*, 10 F 3d 1086, 1092 (CA 4, 1993); *United States v. Patterson*, 128 F3d 1259 (CA 8, 1997); *United States v. Stevens*, 223 F3d 239 (CA 3, 2000).

federal court cases is that a failure to allow the defendant to allocute does not automatically require resentencing.[17]

In Michigan, allocution violations have historically always required resentencing. In *People v. Berry,*[18] the defendant pled guilty pursuant to a plea and sentence bargain. At sentencing, the court imposed the sentence agreed upon without giving the defendant the opportunity to allocute. The Supreme Court found that the applicable court rule, GCR 785.8, required strict compliance. Any failure to allow allocution required resentencing.[19] Sentence bargain or no sentence bargain, the Court held, the defendant must be given the opportunity to make a statement.[20]

The legal grounds for requiring automatic resentencing have dramatically changed since *Berry*. No right to allocution is set out in the Michigan constitution nor in any Michigan statute. As it was in 1980, the right to allocute is addressed solely in the judicially created court rules. However, the language of the court rules has changed since *Berry*. It is no longer mandatory that resentencing be ordered when the provisions of the court rule are violated. In 1989, the Court removed from the court rules the requirement that any failure to grant a defendant

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[17]Other states have similarly adopted a harmless error analysis. See e.g., *State v. Campbell*, 738 NE2d 1178 (Ohio, 2000); *In Re Echeverria*, 6 P3d 573 (Wash., 2000); *State v. Fulton*, 23 P3d 167 (Kan., 2001); *State v. Lindsey*, 554 NW2d 215 (Wisc., 1996); *People v. Boclair*, 587 NE2d 1221 (Ill., 1992).

[18]*People v. Berry*, 409 Mich 774 (1980).

[19]GCR 785.8.

[20]*Berry*, supra at 780.

allocution requires mandatory resentencing.[21] Now, whether resentencing is required "depends on the nature of the noncompliance and must be determined by reference to past case law or on an individual case basis." [22]

This Court reviews the trial court's actions for plain error. Allocution is a procedural rule and not a constitutional right under either the federal or Michigan constitutions. No judgment shall be reversed in any criminal case on the ground of procedural error unless it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.[23] Defendant failed to preserve her non-constitutional claim on appeal by raising an objection in the sentencing court. Issues not properly preserved in the trial court cannot be raised on appeal absent compelling or extraordinary circumstances.[24] This Court has adopted the federal plain error standard of review for all unpreserved error, be it constitutional or nonconstitutional.[25]

It is important to distinguish plain error from harmless error. Harmless error applies when the defendant has made a timely objection to an error. Once an error is established and the error is found to be of constitutional magnitude, the government bears the burden of proving that the error was harmless. Plain error is different. When the defendant has failed to raise an

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[21]See, MCR 6.425, 1989 Staff Comment.

[22]*Id.*

[23]MCL 769.26.

[24]*People v. Grant*, 445 Mich 535, 546 (1994).

[25]*Carines*, supra.

objection it is the defendant who bears the burden of persuasion regarding prejudice.[26] The defendant must show that he has been prejudiced by the trial court's error to the point that a miscarriage of justice has resulted. To present his claim on appeal, defendant must meet a three step test: (1) an error must have occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights.[27] The third requirement requires defendant to show that the error affected the outcome of the trial court proceedings. Even if defendant meets all three parts of the test, this Court will vacate the sentence only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Defendant has failed to show any prejudice from the trial court's error. The trial court did err in not granting defendant the opportunity to speak before her sentence was imposed and, in light of the trial court's duty to allow allocution under MCR 6.425, this error was clear and obvious. Thus, defendant has met the first two parts of the *Olano/Grant* test. Defendant, however, cannot point to any prejudice she suffered by the trial court's error. Defendant makes a vague claim that perhaps if she had the chance to speak, mistakes or misunderstandings may have been revealed. Defendant does not assert what those mistakes or misunderstandings might be or whether they even exist. Defendant claims perhaps the trial court would have considered certain conditions, placements, or treatments to accompany the term of imprisonment. Again, defendant does not state what conditions, placements, or treatments could have been considered.

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[26] *United States v. Olano*, 507 US 725, 113 S Ct 1770, 123 L Ed 2d 508 (1993); *Grant*, supra.

[27] *Olano*, supra.

Nor does defendant even indicate that he would have requested the court to consider other treatment as part of his sentence.

Defendant finally claims that perhaps if she had the chance to speak, the court would have imposed a lesser sentence. This final claim is factually inaccurate. Even if defendant had the chance to speak, the trial court would have had only two options at sentencing: (1) accept the agreement and impose the recommended sentence that both the People and defendant had agreed upon, or (2) reject the plea agreement. Under the first option, defendant obviously suffered no prejudice from not having the chance to speak. The trial court would impose the same agreed upon sentence whether defendant spoke or not. Under the second option, defendant presents no evidence that she would have said anything to dissuade the trial court from accepting the agreement, nor any indication that she desires to have the plea itself set aside, the result if the trial judge rejected the agreement.

If defendant spoke and theoretically had something pertinent to say to convince the court to reject the sentence agreement, the result would not have automatically been a lesser sentence for defendant. It is very possible that defendant's words would have convinced the court that a higher sentence was appropriate. Certainly the result would have been the trial court withdrawing the plea on the motion of either the People or defendant and the case being placed on the trial track once again.[28] Defendant does not argue for this result. Defendant benefitted from the plea and sentence agreement. Defendant avoided going to trial on the charge of First Degree Murder. Defendant had already admitted to the police that she was the person who shot the victim

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[28]See, MCR 6.302(C)(3); MCR 6.310(C).

multiple times in the head and body. (3/2, 9) Chances were very good that defendant would have been convicted as charged and sentenced to mandatory life imprisonment. Defendant has never moved to withdraw her plea and does not argue to this court that she desires that result. Defendant is merely looking for a lesser sentence. The only possible difference defendant's allocution could have made at sentencing was to cause the court to abandon the plea agreement so that defendant would face higher charges and a mandatory life sentence. Defendant claims no prejudice and suffered no prejudice from the trial court's error at sentencing.

This Court has adopted a clear and simple standard of review for all claims of unpreserved error. Under that standard, the defendant bears the ultimate burden of proving that he or she was prejudiced by the trial court's plain error to the point that a miscarriage of justice resulted. That same standard applies to this case. Defendant has failed to preserve her claim of error. Defendant does not present any evidence that she has been prejudiced. Despite the trial court's procedural error, this Court cannot vacate the sentence when no prejudice exists. This Court should affirm defendant's sentence.

RELIEF

WHEREFORE, the People respectfully request this Honorable Court to deny affirm defendant's sentence.

Respectfully submitted,

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Dated: April 4, 2002.
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